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EXAMINER

REICHLE, KARIN M

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GROUP 3700

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/037,377
Filing Date: December 31, 2001
Appellant(s): SIGL, WAYNE CLEMENT

Steven R. LeBlanc
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 12-2-04.

Art Unit: 3761

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Claimed Subject Matter*

The summary of invention contained in the brief is correct.

(6) *Grounds of Rejection to be Reviewed on Appeal*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Grounds A.-D.:

The rejection of claims stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 41.37(c)(1)(vi).

Art Unit: 3761

(8) Claims Appealed

The copy of the appealed claims is correct. However Appellant did not provide such as a Appendix beginning on a new page after the remainder of the Brief. While such does not strictly adhere to the requirements of 37 CFR 41.37(c)(1)(x) the Examiner has, as a courtesy to Appellant, provided a proper copy of the appealed claims in an Appendix to this Answer.

(9) Prior Art of Record

88/06008	MOLNLYCKE(PCT)	8-1988
4,631,062	LASSEN et al	12-1986

(10) Grounds of Rejection

Ground A:

Claims 1, and 13-15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Since the claims have been grouped together and claim 15 is the broadest of the pending rejected independent claims the instant rejection will address claim 15 only.

In regard to claim 15, the range of percentages of the coverage of the surface opposed to the body faceable surface by the retainer flap is unclear, see lines 8-9 and then 16-17 of that claim, i.e. if the flap covers 100% of the surface as set forth on lines 8-9 than the flap covers more than just a portion of the baffle as set forth on lines 16-17. Note also claims 19, 22, last two lines, and 25 which set forth the range being less than 100%. In other words, it is unclear whether 100% of the surface opposed to the body faceable surface is covered by the retainer flap or only a portion thereof.

For the purposes of Grounds B-D:

Claim Language Interpretation

“Labial” or “interlabial” devices or pads are defined as set forth on page 2, lines 19-22 and page 9, lines 6-8 of the instant specification. It is noted however that the claims claim an absorbent article, see page 9, line 4 of the instant specification. “Vestibule” is defined as set forth on page 9, lines 9-12, 16-18 and 22-24 of the instant specification. Direction terms are defined as set forth on page 9, line 33-page 10, line 13 of the instant specification. “Resilient extensibility” is defined as set forth on page 19, lines 14-18 of the instant specification.

“Primarily” and “partially” have not been specifically described in the specification and therefore are given their common, i.e. dictionary definition, i.e. “primarily” is defined as “chiefly; principally”, i.e. more than 50%, and “partially” is defined as “of, pertaining to, or affecting only part; not total”, i.e. 0% to less than 100%. “Printed” also has not been specifically described and therefore will be given its common definition, i.e. “a mark or impression made in or on a surface by pressure”. Due to the lack of clarity of the claims as set forth supra in Ground A and to be consistent with the largest number of claims, the range of percentages of the coverage of the surface in claims 1 and 15 will be considered to be greater than about 40% to less than 100%.

Effective Filing Dates of Claims

The effective filing date of claims 1, 5, 8-11, 13-15, 19 and 22-25 is now the actual filing date of the instant application which is 12-31-01 because the parent application did not disclose

Art Unit: 3761

the portion of the body faceable surface covered being 50% or greater and the claim language does not limit the percentage coverage to less than 50%.

Ground B:

Claims 1, 5, 11, 13, 15, 19 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Molnlycke PCT '008 in view of Lassen et al '062.

Since the claims have been grouped together and claim 15 is the broadest of the pending rejected independent claims the instant rejection will address claim 15 only.

Claim 15: See Claim Language Interpretation section supra and PCT '008 at the abstract, page 2, lines 4-28, page 3, lines 1-30, especially lines 25-27, page 4, lines 5-17, page 5, line 36- page 6, line 3, claims 1-2 and Figures, i.e. the cover is 2, the baffle is 3, the absorbent is 1, the retainer flap as set forth on lines 8 and 10 et seq is elastic sheet 4 (It is noted that "elastic" as defined by the American Heritage Dictionary is "returning or capable of returning to an initial form or state after deformation"). With regard to the range of percentages of coverage, see Claim Language Interpretation section supra and Figures 1-2, i.e. at least about 15% of the opposed surface is covered, and Figures 3-5, i.e. about 50% of the opposed surface is covered. (It is further noted that PCT '008 explicitly teaches that the dimensions of the sheet 4 can be modified, see page 6, lines 5-8 thereof and expresses a desire to shield as much of the inner surface as possible, see, e.g., page 2, lines 30-31).

Therefore the PCT '008 reference teaches all the claimed structure except for the absorbent article therein also being configured for disposition primarily within a vestibule of a female wearer. However, see again page 3, lines 25-27 and the last sentence of the abstract, PCT

Art Unit: 3761

'008 sets forth that the retainer flap 4 constitutes an addition to any conventional absorbent article, i.e. sanitary towel, i.e. napkin, and that such avoids the necessity of having a separate receptacle, i.e. package. Furthermore, see Lassen et al. '062 at, e.g., Figures 1, 2, 5-9 and 11 -16 as well as col. 1, lines 14-27 and 30-32, col. 5, lines 63-68, col. 6, line 17-22, col. 9, lines 20-63, col. 19, line 39-col. 20, line 6, i.e. conventional absorbent articles include sanitary napkins which are configured for partial, i.e. less than 100%(includes more than 50% and thus "primarily"), disposition within the vestibule of a female wearer which are packaged in a separate receptacle. Therefore to combine a sanitary napkin, such as that taught by Lassen et al., which is configured for disposition primarily within the vestibule of a female wearer as well as packaged in a separate receptacle the sheet 4 of '008 would be obvious to one of ordinary skill in the art in view of the recognition that such a configured sanitary napkin is conventional and such combination would obviate the need for a separate receptacle, i.e. cost and use efficient, and the desire of '008 to be combine the sheet 4 with any conventional sanitary napkin to obviate the need for a separate package.

Ground C:

Claims 8-10 and 22-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Molnlycke '008 and Lassen et al '062 as applied to claims 1 and 15 above, and further in view of Lenaghan '326 and Srinivasan '567.

Since these claims have been grouped together, claim 15 is the broadest of the pending rejected independent claims, discussed supra, and Appellant argues these claims on same basis as

Art Unit: 3761

claim 15, see Response to Argument section *infra*, the instant rejection will address claim 23 only as it is the broadest claim depending from claim 15.

Claim 23: see definitions of “elastic” and “resiliently extensible” *supra* and the portions of ‘008 cited *supra*, e.g. abstract, lines 7 and 11-15, i.e. the flap would necessarily and inevitably actively retract as claimed.

Ground D:

Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Molnlycke ‘008 and Lassen et al ‘062 as applied to claim 1 above, and further in view of Houghton et al ‘950 and Richardson ‘466.

It is claimed that the surface which assists in defining and which is disposed within the first cavity includes printed text. In other words the surface of the article which is exposed when the device is folded and the retainer flap is flipped or folded over the ends or in its packaged state has text thereon, i.e. the exterior of the packaging of the absorbent article has printed text thereon. The ‘008 device does not include such text but does teach that the absorbent article is initially packaged, then unpackaged and used and then repackaged for disposal. Furthermore, see Houghton et al at col. 3, lines 49-61, col. 8, lines 19-27, Figures, col. 14, lines 56-59, col. 16, lines 1-19 (It is noted that “graphics” as defined by the dictionary means “Of or pertaining to written representation”, and “written” is defined as “Written form”, “Language symbols or characters written or imprinted on a surface, readable matter”, i.e. printed text). See also Richardson at col. 1, lines 43-46, i.e. instructions or text printed on the packaging which provides information regarding use. These patents teach it is known to use printed text on any portion or

Art Unit: 3761

portions of the package/absorbent article combination, including the package exterior of such combination, to provide information regarding the combination. Therefore, to employ informational graphics, i.e. printed text, on a portion or portions of the package/article combination which will form the package exterior of such combination on the '008 device would be obvious to one of ordinary skill in the art in view of the recognition that it is known to use graphics to provide information about the package/article combination, e.g. instructions as to the intended manner of use, e.g., how to open, use, close, etc., in combination with the packaged absorbent article as taught by Houghton et al and Richardson and the desire for proper use of any absorbent article so as to, e.g. maximize performance, minimize injury, etc.. In so doing the text would be located on the surface which assists in defining and which is disposed within the first cavity when the absorbent article is in use and not in its packaged state. It is noted that this claim does not require text only within the first cavity, i.e. could be other places as well.

(11) Response to Argument

Ground A:

Appellant argues that the term "portion" or "part" includes the "total" or "100%", see second to last paragraph of argument, but then argues that "greater than 40%" includes 100% as does a retainer flap which covers "at least 'a portion of the baffle' " as recited in the claims, see last paragraph of argument. The arguments of such paragraphs are unclear for the same reason that the claim language is unclear in that the term "portion" or "part" necessarily excludes less than the whole or total or 100% and the claims do not recite that "at least a portion of the baffle" is covered by the retainer flap but that "a portion of " the baffle is covered.

Ground B:

Appellant argues 1) PCT '008 in Figures 1-2 teaches the elastic sheet is on the body faceable surface and thus do not teach a retainer flap extending over and covering the surface opposed to the body faceable surface, 2) Figures 1-2 of PCT '008 illustrate a sheet that covers less than 20% of the baffle(however, note the previous argument 1)) and explicitly teaches away from a flap covering greater than 40 % of the baffle because it covers a limited amount of the baffle(again note the previous argument 1)) to prevent covering the absorbent body and to facilitate the principle operation of "tucking" the opposite end into the inverted sheet, i.e. would interfere with the absorbent body, preclude simply tucking and would change the principle of operation if covered more than 40%, 3) that the Examiner suggests modifying PCT '008 to cover greater than about 40% of the outer layer, 4) that combining the male incontinence protector embodiment with the teachings of Lassen to create an absorbent article being configured for disposition primarily within the vestibule of a female wearer completely changes the principle of operation of the embodiment of figures 3-5 and 5) teachings to support obviously combining elements of the prior art in the manner claimed is required for a 103 rejection.

With regard to argument 1), not only does Appellant argue that sheet 4 extends over and covers the baffle in Appellant's argument 2) but the portions of the PCT '008 reference previously cited by the Examiner also teach such, see, e.g., page 3, lines 6-10 thereof. With regard to argument 2), while Figures 1-2 do not illustrate greater than 40% of the baffle being covered, the PCT '008 reference is not only limited to such Figures, the reference as a whole

Art Unit: 3761

teaches covering greater than 40% of the baffle of any conventional absorbent article, see again page 3, lines 25-27, not only Figures 1-2 but also Figures 3-5, and page 6, lines 5-8 thereof, and thus the reference does not explicitly teach away from the claimed invention since it does not teach covering only a limited amount, i.e. 40% or less, of the baffle to prevent covering or interference of the absorbent body and to facilitate the principle operation of tucking. Nor is there any other evidence of record that a flap of greater than 40%, e.g., 41%, interferes with the absorbent body and tucking. With regard to arguments 3) and 4), Appellants argument of the Examiner's position is not consistent with the rejection. Examiner did not modify the cover of PCT '008 to cover more than 40% of the outer layer, i.e. the PCT '008 reference teaches such, nor combine the teachings of Lassen with a male incontinence protector embodiment. As set forth supra in the grounds of rejection, the '008 device is considered to teach all the claimed structure including the combination or addition of the sheet 4 with any conventional absorbent article except for explicitly teaching that such absorbent article also is configured for disposition primarily with a vestibule of a female wearer. See again page 3, lines 25-27 and the last sentence of the abstract, '008 sets forth that the retainer flap 4 constitutes an addition to any conventional sanitary towel, i.e. napkin, and that such avoids the necessity of such article having a separate receptacle, i.e. package. (Note also the element denoted 4 in Figures 3-5 as well as that in Figures 1-2). Furthermore, see Lassen et al. '062 at, e.g., Figures 1, 2, 5-9 and 11 -16 as well as col. 1, lines 14-27 and 30-32, col. 5, lines 63-68, col. 6, line 17-22, col. 9, lines 20-63, col. 19, line 39-col. 20, line 6, i.e. teaches that conventional absorbent articles include sanitary napkins which are configured for partial, i.e. less than 100%(includes more than 50% and thus "primarily"), disposition with in the vestibule of a female wearer which were packaged in a

Art Unit: 3761

separate receptacle. Therefore to combine a sanitary napkin, such as that taught by Lassen et al., which is configured for disposition primarily within the vestibule of a female wearer as well as packaged in a separate receptacle with the sheet 4 of '008 would be obvious to one of ordinary skill in the art in view of the recognition that such a configured sanitary napkin is conventional and such combination would obviate the need for a separate receptacle, i.e. cost and use efficient, and the desire of '008 to be combine the sheet 4 with any conventional sanitary napkin to obviate the need for a separate package. With regard to argument 5), such argument is deemed narrower than the teachings of the prior art and the combination of such in the prior art rejection, see discussion of Grounds of Rejection, Ground B supra as well as the Response to Argument, 1)-4) supra, i.e. motivation for combining the teachings of the prior art has been provided as a basis for the 103 rejection.

Ground C:

Appellant argues that the prior art does not teach the claimed invention for the same reasons as set forth in Argument B. Therefore, see Response to Argument, Ground B supra.


Ground D:

Appellant argues that the prior art does not teach the claimed invention for the same reasons as set forth in Argument B. Therefore, see Response to Argument, Ground B supra.

For the above reasons, it is believed that the rejections should be sustained.

Art Unit: 3761

Respectfully submitted,

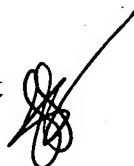

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February 16, 2005

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